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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GLENN POWELL,

Plaintiff,

vs.

BLACKROCK ASSET MANAGEMENT,
LLC and JOHN HARRIS,

Defendants.

CASE NO. SACV 11-0517-JST (RNBx)

**ORDER (1) GRANTING PLAINTIFF'S
APPLICATION FOR DEFAULT
JUDGMENT AND (2) GRANTING
PLAINTIFF'S REQUEST FOR
ATTORNEY'S FEES**

1 Before the Court is Plaintiff Glenn Powell's Application for Default Judgment (Doc. 11)
 2 and Request for Attorney's Fees (Doc. 12). The Court finds these matters appropriate for
 3 disposition without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Having read
 4 the papers in support of Plaintiff's motions, the Court GRANTS Plaintiff's Application for
 5 Default Judgment and GRANTS Plaintiff's Request for Attorney's Fees and awards
 6 damages and attorney's fees in the total amount of \$9,320.00.

7 8 **I. Background**

9 Plaintiff filed a complaint against Defendant Blackrock Asset Management and
 10 John Harris ("Defendants") for unfair debt collection practices in violation of the Fair Debt
 11 Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), and the Rosenthal Fair
 12 Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.* ("RFDPCA"). (Doc. 1.) On
 13 July 8, 2011, the clerk entered default against Defendants. (Doc. 9.) Plaintiff filed this
 14 Application for Default Judgment (Doc. 11) and Request for Attorney's Fees (Doc. 12) on
 15 August 8, 2011.

16 17 **II. Legal Standard**

18 Under Rule 55 of the Federal Rules of Civil Procedure, default judgment is a two-
 19 step process. *See* Fed. R. Civ. P. 55; *see also Eitel v. McCool*, 782 F.2d 1470, 1471 (9th
 20 Cir. 1986). Prior to entry of default judgment, there must be an entry of default. *See* Fed.
 21 R. Civ. P. 55. Upon entry of default, the factual allegations of the complaint, save for
 22 those concerning damages, are deemed to have been admitted by the defaulting party. Fed.
 23 R. Civ. P. 8(b)(6); *See Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). "On
 24 the other hand, a defendant is not held to admit facts that are not well-pleaded or to admit
 25 conclusions of law." *United States v. Cathcart*, No. C 07-4762 PJH, 2010 WL 1048829
 26 (N.D. Cal. Feb. 12, 2010). "[I]t follows from this that facts ... not established by the
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1 pleadings of the prevailing party, or claims ... not well-pleaded, are not binding and cannot
2 support the judgment.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

3 A district court has discretion to grant or deny a motion for default judgment.
4 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit has set out
5 seven factors to be considered by courts in reviewing a motion for default judgment: “(1)
6 the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive claim (3)
7 the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the
8 possibility of a dispute concerning material facts, (6) whether the default was due to
9 excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil
10 Procedure favoring decisions on the merits.” *Eitel*, 782 F.2d at 1471-72.

11 “If the court determines that the allegations in the complaint are sufficient to
12 establish liability, it must then determine the ‘amount and character’ of the relief that
13 should be awarded.” *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916,
14 920 (quoting 10A Charles Alan Wright, Arthur R. Miller, & May Kay Kane, *FEDERAL*
15 *PRACTICE AND PROCEDURE* § 2688, at 63 (3d ed. 1998)). This is because the
16 allegations of the amount of damages suffered are not necessarily taken as true. *Geddes*,
17 559 F.2d at 560.

18 Accordingly, the Court may hold a hearing to determine the amount of damages.
19 Fed. R. Civ. P. 55(b)(2)(B). Under Ninth Circuit law, “[i]t is well settled that a default
20 judgment for money may not be entered without a hearing unless the amount claimed is a
21 liquidated sum or capable of mathematical calculation.” *Davis v. Fendler*, 650 F.2d 1154,
22 1161 (9th Cir. 1981). However, a “hearing” under this rule need not include live
23 testimony, but may instead rely on declarations submitted by the parties, so long as notice
24 of the amount requested is provided to the defaulting party. C.D. Cal. R. 55-2.

1 **III. Discussion**

2 **a. Merits of Plaintiff's FDCPA and RFDCPA Claims**

3 “In order for a plaintiff to recover under the FDCPA, there are three threshold
4 requirements: (1) the plaintiff must be a ‘consumer’; (2) the defendant must be a ‘debt
5 collector’; and (3) the defendant must have committed some act or omission in violation of
6 the FDCPA.” *Robinson v. Managed Accounts Receivables Corp.*, 654 F. Supp. 2d 1051,
7 1057 (C.D. Cal. 2009). These violations include (1) unfair or unconscionable collection
8 methods, (2) conduct which harasses, oppresses, or abuses any debtor, and (3) any false,
9 deceptive, or misleading statements in connection with the collection of a debt. 15 U.S.C.
10 § 1692(d)-(f). Furthermore, employees of debt collection agencies may be held personally
11 liable for violations of the FDCPA. *Robinson*, 654 F. Supp. 2d at 1059.

12 According to the Complaint, Defendant Harris is an employee of Defendant
13 Blackrock, a debt collector. Harris, on behalf of Blackrock, attempted to collect on a
14 consumer purchase debt that Blackrock claimed Plaintiff owed and that allegedly became
15 delinquent in 2004. Specifically, on or about March 18, 2011, Defendants sent a letter
16 titled “litigation notice” to Plaintiff’s ex-wife’s address, a residence where Plaintiff had
17 never lived. The subject line included “Blackrock Asset Management, LLC v. Glenn J.
18 Powell” and “Case No. KL009418.” The letter stated that Plaintiff had ignored previous
19 attempts to resolve the matter and that a lawsuit may be the next step, “resulting in a
20 judgment” against Plaintiff. It also stated that a judgment may be collected through a wage
21 garnishment, levy on bank accounts, or liens on real or personal property, among other
22 methods. This letter instructed Plaintiff to contact Blackrock within ten days or litigation
23 would be commenced.

24 Plaintiff telephoned Harris on March 22, 2011. Harris told Plaintiff that the final
25 payment on his Providian credit card had never been received. Harris said that, as a result,
26 Blackrock was pursuing legal action and would report the debt to credit agencies. Harris
27 also told Plaintiff that Plaintiff could dispute the debt in court and that even if the court
28

1 agreed with Plaintiff, Plaintiff would still have to pay the original amount owed. He also
 2 asked Plaintiff whether a Sheriff or other court representative had delivered paperwork to
 3 Plaintiff. To settle the alleged debt obligation, Harris offered Plaintiff the option to pay
 4 half the amount allegedly owed if paid that same day. Plaintiff told Harris that he would
 5 review his paperwork and notify Blackrock of his decision. Harris subsequently sent
 6 Plaintiff a letter via email memorializing the terms of Blackrock's settlement offer. In the
 7 letter, Harris also implied that Plaintiff had agreed to pay the reduced amount by
 8 referencing the amount as a "settlement agreement." Blackrock has not filed suit against
 9 Plaintiff.

10 The Court finds that the allegations in Plaintiff's Complaint and Application for
 11 Default establish liability for violation of the FDCPA. Specifically, the allegations
 12 establish that Defendant (1) failed to provide notice within five days of initial
 13 communication, as required by § 1692g(a) (Compl., Ex. A); (2) represented or implied that
 14 nonpayment of the alleged debt would result in wage garnishment, in violation of §
 15 1692e(4) (Compl., Ex. A); (3) misled Plaintiff by stating that he would owe the original
 16 amount even if a court agreed with him, in violation of § 1692e(10) (Compl., ¶ 28); and
 17 (4) implied that litigation had been initiated by asking whether a court representative or
 18 Sheriff had delivered paperwork, also in violation of § 1692e(10). (Compl., ¶ 30.)
 19 Furthermore, each of these violations also constitutes a violation of the RFDCPA. Cal.
 20 Civ. Code § 1788.17.

21 22 **b. *Eitel* Factors**

23 The Court concludes that the *Eitel* factors weigh in favor of granting Plaintiff's
 24 application for default. As to the first factor, Plaintiff would suffer prejudice if the Court
 25 does not grant his application because he has no other means of recourse. As to the second
 26 and third factors—the merits of the claim and the sufficiency of the complaint—the Court
 27 concluded above that Plaintiff's Complaint establishes violations of the FDCPA and
 28

1 RFDCPA. The fourth factor is also met because the amount of money at stake is
2 reasonable in light of the damages provisions of the FDCPA and RFDCPA, as discussed
3 below.

4 Because Defendants have failed to appear in this matter, the remaining three factors
5 counsel in favor of default. There is no evidence that Defendant's failure to appear is the
6 result of excusable neglect. Furthermore, given the sufficiency of Plaintiff's pleadings,
7 there is unlikely to be a dispute of material fact. Finally, a decision on the merits appears
8 to be unattainable in this matter.

10 **IV. Remedies**

11 Having determined that Plaintiff is entitled to entry of default judgment, the Court must
12 determine the relief that should be awarded. Here, Plaintiff requests \$2,000 in statutory
13 damages, \$5,000 in actual damages, \$5,320 for attorney's fees, and \$549 for service and
14 filing costs. The Court finds that Plaintiff is entitled to \$2,000 in statutory damages,
15 \$2,000 in actual damages, and \$5,320 in attorney's fees. The court addresses each
16 category separately below.

17 **a. Statutory Damages**

18 **i. FDCPA**

19 Plaintiff is entitled to statutory damages up \$1,000 for Defendant's violations of the
20 FDCPA. 15 U.S.C. § 1692k(a)(2)(a). The Court must consider, among other factors, "the
21 frequency and persistence of noncompliance by the debt collector, the nature of
22 noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C.
23 § 1692k(b)(1). Defendant's failure to appear in this case and the allegations in the
24 Complaint establish that Defendant's acts were intentional. The Court determines that
25 Plaintiff is entitled to \$1,000.

1 ii. RFDCPA

2 Under the RFDCPA, the Court may award the Plaintiff statutory damages for
3 willful and knowing violations of the Act by Defendant. Cal. Civ. Code § 1788.30(b).
4 The Court has the discretion to choose an amount between \$100 and \$1,000 as a penalty to
5 the debt collector. *Id.* Because the Complaint alleges that Defendant's actions were
6 willful and knowing, and because Defendant has failed to appear in the action, the Court
7 awards Plaintiff \$1,000 in statutory damages under the RFDCPA.

8
9 **b. Actual Damages**

10 Under the FDCPA, Plaintiff is entitled to "any actual damage sustained by such
11 person as a result of such failure" of Defendant to comply with the Act. 15 U.S.C. §
12 1692k(a)(1). Actual damage includes recovery for emotional distress such as humiliation,
13 embarrassment, fear, nervousness, difficulty eating and sleeping, lack of concentration,
14 and anxiety. *Riley v. Giguere*, 631 F. Supp. 2d 1295, 1314-16 (E.D. Cal. 2009) (noting
15 persuasively the similarities between the FDCPA and the Fair Credit Reporting Act
16 ("FCRA") and adopting Ninth Circuit law on "actual damage" under the FCRA); *see also*
17 *Panahiasl v. Gurney*, No. 04-04479 JF, 2007 WL 738642 at * 3 (N.D. Cal. Mar. 8, 2007)
18 (plaintiff recovered for emotional distress symptoms including embarrassment, fear, anger,
19 panic, humiliation, nervousness, crying fits, difficulty eating and sleeping, and diarrhea).
20 *Cf. Valero v. Bryant, Lafayette & Assocs.*, No. 1:10-cv-01174 OWW GSA, 2011 WL
21 1438436 at *3 (E.D. Cal. Apr. 14, 2011) (requiring plaintiff to meet the standards for a
22 state intentional infliction of emotional distress claim to recover damages under the
23 FDCPA).

24 Plaintiff has submitted two detailed declarations, his own, (Doc. 11-3), and that of
25 his wife, (Doc. 11-1), attesting to his emotional distress.¹ Plaintiff has also provided notice

26
27 ¹ The Court concludes that, in this case, live testimony would be unavailing. Observation of
28 Plaintiff's demeanor would not aid the Court because Plaintiff's testimony would be as to past,
(footnote continued)

1 of the amount of damages he has requested. (Doc. 14). Plaintiff alleges that he
2 experienced symptoms of emotional distress for approximately two weeks, between the
3 time that he first received a letter from Blackrock on or about March 18, 2011 until the
4 present lawsuit was filed on April 5, 2011 (Powell Decl. at ¶¶ 4, 48.) He alleges that he
5 experienced panic, embarrassment, fear, anxiety, and humiliation. Specifically, he alleges
6 that he feared that someone would come to his door to give him legal documents, that he
7 considered paying the debt even though he did not owe it, and he jumped every time his
8 cell phone rang. He also alleges that he was irritable and argumentative, and as a result,
9 his marriage suffered. The physical symptoms he alleges include headaches, nausea,
10 tension resulting in back, shoulder and neck pain, and sleeplessness. Finally, his wife also
11 observed that he was agitated, panicked, nauseous, and had trouble sleeping. She also
12 stated that the situation caused tension within her marriage to Plaintiff. (Green Decl., Doc.
13 11-1.) Plaintiff's emotional distress clearly falls into the category of cases where plaintiffs
14 suffered from general symptoms such as embarrassment, anxiety, and sleeplessness over a
15 short period of time without a need for mental health treatment. *Thomas W. Smith, Dean,*
16 *& Assocs.*, No. ELH-10-CV-3441, 2011 WL 2730787 at *4 (D.Md. July 12, 2011)
17 (surveying several district court cases awarding actual damages for emotional distress in
18 FDCPA cases). The Court finds that the allegations here are most similar to the facts in
19 *Jenkins v. Eastern Asset Management, LLC*, in which defendant threatened to sue plaintiff
20 in the course of five calls in a one-week period. No. 4:08-CV-1032 CAS, 2009 WL
21 2488029 (E.D. Mo. Aug. 12, 2009). In that case, the plaintiff was awarded \$2000 in actual
22 damages. Therefore, the Court concludes that Plaintiff is entitled to \$2,000 in actual
23 damages for emotional distress. *See also Smith v. Law Offices of Mitchell N. Kay*, 124

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26 rather than present, emotional distress. Also, because emotional distress is not capable of precise
27 mathematical calculation, the Court must necessarily survey other cases with similar facts to arrive
28 at an appropriate sum. Therefore, the Court determines that it need not hear live testimony to
determine actual damages.

1 B.R. 182 (D.Del. 1991) (holding that \$3,000 is the “largest award the Court can, in good
2 conscience, permit the plaintiffs to recover for their emotional distress” where plaintiffs
3 received three letters and a phone call over a three-week period threatening legal action,
4 garnishment of wages, and sequestration of their property.)

5
6 **c. Attorney’s Fees**

7 Under Local Rule 55-3, attorney’s fees may be awarded when an applicable statute
8 provides for such recovery. C.D. Cal. R. 55-3. Both the FDCPA and RFDCPA entitle
9 Plaintiff to reasonable attorney’s fees and costs. 15 U.S.C. § 1692k(a)(3); Cal. Civ. Code
10 § 1788.30(c). The Court must determine an attorney fee award in an FDCPA case using
11 the lodestar method. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n. 4 (9th Cir.
12 2001). Plaintiff argues that he is entitled to a lodestar amount of \$5,320, based on 15.2
13 hours of work at an hourly rate of \$350. (Mot. for Atty’s Fees, Doc. 12, at 7.)

14 In support of the motion, Plaintiff filed a declaration by his counsel supported by a
15 survey of attorney hourly rates showing that the median hourly rate in California in 2010
16 was \$412 per hour. (Tatar Decl., Doc. 12-1, Ex. C at 45.) The Court concludes that
17 Plaintiff’s counsel’s rate of \$350 per hour is reasonable. *See Welch v. Metro. Life Ins. Co.*,
18 480 F.3d 942, 947 (9th Cir. 2007) (holding that attorney affidavits regarding prevailing
19 rates are satisfactory evidence of prevailing market rates). Plaintiff also attached a
20 statement of services to his counsel’s declaration, in which Plaintiff’s attorney set forth the
21 tasks she did and for how long, for a combined total of 15.2 hours of work on behalf of
22 Plaintiff. The Court concludes that Plaintiff has met his burden of documenting and
23 submitting as evidence the appropriate hours expended in the litigation. *See id.* at 948
24 (citing *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992)). Therefore, the Court
25 finds Plaintiff’s request for \$5,320 in attorney’s fees to be reasonable.

1 **d. Costs**

2 Under the FDCPA and RFDCPA, Plaintiff is entitled to the costs of the action. 15
3 U.S.C. § 1692k(a)(3); Cal. Civ. Code § 1788.30(c). In accordance with Local Rule 54-3,
4 Plaintiff may submit a Bill of Costs and a Notice of Application to the Clerk to Tax Costs
5 to recover the costs of this action. C.D. Cal. R. 54-3.

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7 **V. Conclusion**

8 For the reasons discussed above, the Court GRANTS Plaintiff's Application for
9 Default Judgment, for a total award amount of \$9,320 to be broken down as follows:

- 10 1. \$2,000 in statutory damages under the FDCPA and RFDCPA.
11 2. \$2,000 in actual damages for emotional distress.
12 3. \$5,320 in attorney's fees.

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14 DATED: September 30, 2011

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16 **JOSEPHINE STATON TUCKER**
17 JOSEPHINE STATON TUCKER
18 UNITED STATES DISTRICT JUDGE
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